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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Television Systems	)	
and Their Impact upon the	)	MM Docket No. 87-268
Existing Television Broadcast	)	
Service	)	

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To: The Commission

COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA IN THE FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING AND THIRD NOTICE OF INQUIRY

James N. Horwood, Esq.
Spiegel & McDiarmid
1350 New York Ave., N.W.
Washington, D. C. 20005
(202) 879-4000
(Of Counsel)

Jeffrey S. Hops
Director, Government Relations
Alliance for Community Media
666 11th St., N.W.
Suite 806
Washington, D.C. 20001
(202) 393-2650

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SUMMARY

The Alliance for Community Media is a national membership organization dedicated to ensuring everyone's access to electronic media. The Alliance's membership is comprised of organizations and individuals associated with public, educational and governmental ("PEG") access channels on cable television systems. The Alliance believes that implementation of advanced television services ("ATV") should guarantee that non-commercial, non-profit, educational, public, and local institutions share the benefits of advanced communications technology.

The development of ATV may offer the most significant opportunity since the birth of television to make the mass media more responsive to local needs and non-commercial voices. The broadcasting industry, however, sees this as an opportunity to receive $70 billion worth of federally-owned electromagnetic spectrum for free. The industry is using transparent "bait and switch" tactics, which it euphemistically calls "spectrum flexibility."

Initially, the broadcasting industry proposed that it be given $70 billion worth of spectrum on a short-term basis, simply and exclusively to make a transition to providing high-definition television ("HDTV") signals. While the proposal may have may have seemed reasonable at the time, it is no longer; technology has increased the carrying capacity of spectrum exponentially, and the industry now wants to abandon its commitment to provide HDTV -- but wants to keep the spectrum. The industry is recommending that it supply one channel of free over-the-air television transmitted digitally (imposing a significant expense

on consumers without any appreciable improvement in service), which will allow the industry to use its valuable additional capacity for a number of other lucrative uses, including data transmission, communications services and subscription video services. The industry has forgotten that broadcasters are licensed to provide a specific service; a license is not for any use of spectrum at the licensee's discretion.

Even more incredibly, the industry wants to develop ATV under anti-competitive, cartel-like conditions, by initially prohibiting any non-broadcaster from receiving an ATV license. The Commission's notice recommends this course, but has failed to build a record -- or even a rationale -- for this policy. The policy is so poorly defended that a federal court would be very likely to find the policy "arbitrary and capricious."

Instead of giving $70 billion of spectrum to broadcasting conglomerates, the Commission should require broadcasters to compensate the American people for use of the people's spectrum. The Commission should receive fair market value for this spectrum, using one of a number of methods that will permit broadcasters that sincerely want to make a transition to digital transmission of free broadcasts to do so. Auctions, quasi-auctions, "condominium" and "quasi-common carriage" proposals will give broadcasters free access to a digital broadcast platform without giving away our country's birthright in the process. Compensation derived from broadcasters' use of the spectrum can, should, and must be earmarked for public, educational, local, non-commercial and non-profit programming which will help support our schools and communities.

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COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA
IN THE FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING
AND THIRD NOTICE OF INQUIRY

The Alliance for Community Media (the "Alliance") respectfully submits the following comments in response to the Fourth Further Notice of Proposed Rulemaking/Third Notice of Inquiry, FCC 95-315, in the above-captioned proceeding, released August 9, 1995 ("Fourth Notice"). The Commission seeks comments on under what terms and conditions free over-the-air broadcasting should make a transition from analog to digital technology. The Alliance urges the Commission to promote localism, equitable access, programming and viewpoint diversity, and fiscal prudence in promulgating regulations for Advanced Television ("ATV").

I. ADVANCED TELEVISION SERVICES SHOULD SUPPORT OUR NATION'S EDUCATIONAL, PUBLIC, AND COMMUNITY INSTITUTIONS

The Alliance for Community Media is a national membership organization comprised of more than thirteen hundred organizations and individuals in more than seven hundred communities. Members include access producers, access center

managers and staff members, local cable advisory board members, city cable officials, cable company staff working in community programming, and others involved in public, educational and governmental ("PEG") access programming around the country. The Alliance assists in all aspects of community programming, from production and operations to regulatory oversight.

These centers produce and transmit local non-commercial, non-profit educational and public affairs television programming on local cable systems, pursuant to local franchise agreements authorized by Section 611 of the 1984 Cable Act.[1] As such, the Alliance represents the interests of religious, community, educational, charitable, and other non-commercial, non-profit institutions who utilize PEG access centers and facilities to speak to their memberships and their larger communities and participate in an ever-growing "electronic town hall." The organization represents the interests of the hundreds of thousands of employees and volunteers who help produce educational, governmental and public access programming. Finally, it represents the concerns of all Americans who believe that the tremendous resources of the Information Age should be made available to "at-risk" communities that otherwise would have insufficient means.

In many smaller and rural towns and villages, PEG access is the only means by which residents receive truly local programming. In suburban jurisdictions which may be served by

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[1]47 U.S.C. Sec. 531.

one or more broadcast stations, PEG access programming allows cable subscribers to participate in events and activities of importance to the suburban community, from local school board meetings and town council elections to televised plays and concerts. PEG access also provides a forum for local religious education programming, community college courses, and high school football games. In large urban areas, PEG access provides a variety and diversity of communication which is unavailable on commercial local stations.

PEG access is provided on cable systems pursuant to a franchise agreement between a cable operator and a franchising authority (typically, a municipal government)[2]. Cable operators may also be required to provide services, facilities and equipment to make such access possible.[3] Franchise authorities, which are entitled to collect franchise fees of up to five percent of gross revenue from cable operators,[4] will often provide a portion of these fees for PEG access.

The PEG access provisions of federal law result from Congress' resolve that our nation's telecommunications policy should promote the production and distribution of local programming produced by members of the community for the

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[2]Cable Communications Policy Act of 1984, Sec. 611 (47 U.S.C. Sec. 531).

[3]Id.

[4]1984 Cable Act, Sec. 622 (47 U.S.C. Sec. 542)

community's benefit[5]. As the House Commerce Committee stated in its report on the 1984 Cable Act:

> Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.[6]

PEG access centers and community communication centers help fulfill the Commission's long-standing public interest in promoting localism[7] by providing an open forum for local programming.

Alliance members believe that Americans should not be mere passive consumers of information and entertainment, but active participants in political dialogue, local economic development, and artistic endeavor. The First Amendment requires that schools, churches, community organizations, and individuals have meaningful access to advanced forms of media as telecommunications become increasingly sophisticated -- and increasingly

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[5]See H.Rep. No. 934, 98th Cong. 2d Sess. at 30-37 (discussing policy and legal rationale for PEG access).

[6]Id. at 30.

[7]See Id.; see also Section 307(b) of the Communications Act of 1934 (47 U.S.C. Sec. 307), requiring Commission to provide fair, efficient and equitable distribution of radio service among "the several states and communities." See also Options Papers Prepared by the Staff for Use by the Subcommittee on Communications, H.Comm.Print 95-13, 95th Cong. 1st Sess. (1977) at 45-65 ("Options Papers").

concentrated.[8] Consequently, the Alliance supports implementation of advanced television services that provide for the expansion of First Amendment access rights, and that guarantee that non-commercial, non-profit, educational and public institutions share the benefits of advanced communications technology.[9]

The advent of digital compression has allowed for a quantum expansion in the amount of information that can be carried over a standard 6MHz television broadcast channel.[10] A 6 MHz band currently carrying only one standard broadcast channel (plus ancillary non-broadcast services) can now carry six or seven separate channels, including a number of television programming channels whose quality meets or exceeds current National

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[8]See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)("[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market."); see also Note, "The Message in the Medium: the First Amendment on the Information Superhighway," 107 Harv.L.Rev. 1062, 1088 (1994)("If only certain classes of users have access, then particular viewpoints remain scarce."); See also D. Bazelon, "The First Amendment and the 'New Media' -- New Directions in Regulating Telecommunications," 31 Fed.Com.L.J. 201, 209 (1979)("[S]urely it is reasonable to assume that concentration will tend to stifle, rather than promote a multitude of tongues.").

[9]As Rep. Wallace White noted in debate on the Radio Act of 1927:

> [L]icenses should be issued only to those stations whose operations would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art ... If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.

67 Cong.Rec. 5479 (1926).

[10]Id.

Television Standards Committee ("NTSC") standards.[11] Alternatively, one 6 MHz channel can simultaneously carry a wide range of video and non-video telecommunications services, available either to the general public or for a fee to subscribers.[12]

Advanced television ("ATV"), if regulated in the public interest, may offer the most significant opportunity since the advent of broadcast television itself to make the mass media more responsive to local needs and non-commercial voices. The commercial broadcast market alone will not be able to sustain a sixfold increase in capacity.[13] A model for the transition to ATV therefore can and should include an allocation or reservation for non-commercial educational, governmental, and local public access, and the resources, facilities, and equipment to support program production. The most sensible solution is to require commercial licensees to compensate the government for the market value of their use of the electromagnetic spectrum. This would create an income stream to fund the programming production and distribution which meets the Commission's public interest goals

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[11] Id.

[12] Id.

[13] Fourth Notice at 3, Par. 4; See Options Papers, supra at 47 ("The experience of the past 25 years has demonstrated that the economics of commercial broadcasting will not support [even] 2,000 outlets."). As of January 1, 1995 there were only 1,161 commercial full power broadcast television stations in the United States. 63 Television and Cable Factbook at C-1 (1995).

and concerns.[14]

Instead of endorsing broadcast regulation which supports the public interest, the broadcasting industry is using blatant "bait and switch" tactics to acquire 6 MHz of free spectrum whose total value has been conservatively estimated by the Commission to be between $11 and $70 billion.[15] The industry euphemistically calls this scam "spectrum flexibility." The industry has dramatically repudiated its initial claim that new spectrum was technologically necessary for the development of High Definition Television ("HDTV"). Now, the industry wants to use this "transition" allocation for any service they choose -- possibly even excluding the requirement that they provide free over-the-air video programming on "their" spectrum allocation.[16] The Commission should resist falling for this transparent scheme.

A permanent cartel of entrenched broadcasting companies has never before been the paradigm for broadcast regulation and should not be made so now by giving away this phenomenally valuable resource to incumbents at the expense of all other potential entrants. A tremendous opportunity to make the

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[14]See, e.g., Paul Fahri, "The Battle Over Kids' TV: Bert and Ernie vs. Biker Mice," Washington Post, October 31, 1995, D1; See also Options Papers, supra, at 65-79.

[15]See May 5, 1995 and September 6, 1995 letter from FCC Office of Plans and Policy to Senator Joseph Lieberman.

[16]Fourth Notice at 18, Par. 42. The Commission asks whether the obligation to simulcast should be "tradeable." As discussed at Section V-B at 17, infra, this option would free a broadcaster from the obligation to provide any "transition" service on this "transition" spectrum.

broadcast media more accessible to individual Americans may be lost forever, simply to provide an unjustified and unjustifiable windfall for the broadcasting divisions of corporate conglomerates whose sole motivation is profit.

The entities potentially benefitting from this windfall will not be "mom and pop" broadcasters. Most broadcasting companies are multi-billion dollar conglomerates -- or subsidiaries of those conglomerates. They have substantial stakes not only in television broadcast, but in radio broadcast, television and movie production, theme parks, hotels, military hardware and household appliance manufacturing, newspapers, cable systems, recording studios, and publishing houses.[17] The Commission should consider alternative options which would permit incumbent broadcasters to convert to digital television while allowing both smaller entrepreneurs and non-profit, non-commercial voices to have meaningful access to the broadcast market.

II. THE MARKETPLACE SHOULD DETERMINE HOW AND IF HIGH DEFINITION TELEVISION IS TO BECOME A STANDARD.

Broadcasters have already indicated that they are doubtful that either consumers or advertisers will support High Definition Television ("HDTV") technology;[18] the Alliance shares their

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[17]63 Television and Cable Factbook at A-1361-1394 (1995).

[18]Paul Fahri,"FCC Gathering to Decide on Fate of HDTV," Washington Post, July 27, 1995, B9.

skepticism. John S. Reidy, Managing Director, Smith Barney, Inc. stated in September 1995 before the Senate Committee on Commerce, Science and Transportation hearing on spectrum auctions that,

> Today, there is not yet even a prototype for a popularly priced HDTV television, no one knows when a mass market priced product could become available, and so the originally contemplated 15-year transition period seems totally inadequate in terms of inducing complete domestic conversion to HDTV reception capability in all U.S. television households.[19]

HDTV has not yet been successful in Japan, where it was first developed; of the approximately 70 million Japanese homes with televisions, only 45,000 HDTV receivers had been sold to the public as of December 1994,[20] although the receivers have been available on the retail market since November 1991.[21]

Another indicator of HDTV's infirmity was the indefinite postponement of an announcement scheduled for November 8, 1995 by the Association for Maximum Service Television ("MSTV") regarding their plans to build and operate a HDTV test facility.[22] The announcement was canceled because "important details, such as

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[19]Testimony of John S. Reidy, Managing director and Senior Securities Analyst, Smith Barney, Inc., before the United States Senate Committee on Commerce, Science and Transportation Hearing on Spectrum Auctions, September 12, 1995, at 2.

[20]Telephone Interview with Shinichiro Sakata, Counsellor for Telecommunications, Embassy of Japan (November 8, 1995).

[21]Id. The retail price of HDTV units has fallen from approximately $30,000 USD in 1991 to $3,000 USD. However, Mr. Sakata stated that Japanese consumers interested in receiving improved television service were generally subscribing to direct broadcast satellite service. Id.

[22]Paul Fahri, "Coalition Plans to Build Model HDTV Station," Washington Post, Nov. 9, 1995 at B11.

cost and location of the station," had not yet been resolved.[23] The broadcast industry has been unable to agree on a test plan and procedure for HDTV for over five years.[24]

The Commission should not require HDTV broadcasts, but should not discourage it, either. The Commission should issue free HDTV-only licenses to any qualified applicants. To support this test regime, the Commission should allocate a total of 30 MHz of spectrum from currently non-utilized bandwidth (for example, in the 800-900 MHz range) to issue such licenses.

If there is significant demand for the HDTV format, the Commission may begin to convert the remaining television spectrum to HDTV at the end of an appropriate test period (for example, the proposed 15-year transition period) in a manner consistent with this rulemaking, including reversion of the 6 Mhz analog channel to the Commission. Thereafter the Commission could require all HDTV applicants, including renewals, to pay for use of the spectrum via auction, lease, user fee, or royalty.[25]

"Ancillary and supplementary" services, including subscription video programming services ("A&S"), should not be permitted to subsidize HDTV development; if it is commercially

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[23] Id. The Alliance believes that the admission by the Association for Maximum Service Television that important details still remain to be settled suggests that the timing of this announcement may not have been merely coincidental.

[24] The Commission first made provision of HDTV services a goal in 1990. First Report and Order in MM Docket No. 87-268, 5 FCC Rcd 5627 (1990).

[25] See Section VIII, infra.

viable, it should prove itself on its own terms. Officious provision of HDTV, a service few consumers seem to want, should not become a mere ruse for broadcasters' free entry into the profitable A&S market.

The broadcast industry has prudently focused its attention on digital standard definition television ("SDTV") as an alternative to HDTV.[26] Although the Commission should continue to leave a window open for HDTV, the SDTV format seems much more likely to supplant NTSC television -- whether decided by the marketplace or imposed by the Commission.

SDTV, like HDTV, should be permitted to develop in the marketplace. Though SDTV is clearly an advance in technological sophistication over conventional analog television, consumers may decide there is little to be gained in picture quality and programming and much to be lost in receiver and converter box costs.[27] SDTV technology may not make analog television broadcasting obsolete. If at the end of a fifteen year trial period (or ideally, some earlier period) no significant demand for ATV has arisen, the entire transition spectrum should be returned for the Commission to allocate to other uses.

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[26] Fourth Notice at 8, Par. 17.

[27] Id.

III. THE COMMISSION SHOULD NOT GIVE INCUMBENT BROADCASTERS A $70 BILLION CHRISTMAS GIFT.

The Commission's notice recommends that the spectrum for this "quantum leap in the benefits that may be derived from television service"[28] be given only to incumbent licensees (which could be considered to represent a cartel) as a $70 billion gift from the United States Treasury.[29] The FCC does not currently auction television broadcast spectrum or charge anything other than nominal registration fees for its use.[30] This gift to the very profitable broadcast industry[31] has been provided for decades. The status quo, however, is not self-justifying. Recent auctions of PCS spectrum netted $8 billion

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[28]Fourth Notice at 5, Par. 11.

[29]Id. at 12, Sec. 27; see also Tentative Decision and Further Notice of Inquiry in MM Docket No. 87-268, 3 FCC Rcd 6520 (1988)("Second Inquiry"); First Report and Order in MM Docket No. 87-268, 5 FCC Rcd 5627 (1990)("First Order"); Notice of Proposed Rule Making in MM Docket 87-268, 6 FCC Rcd 7024 (1991)("Notice");Second Report and Order/Further Notice of Proposed Rule Making in MM Docket 87-268, 7 FCC Rcd 3340 (1992)("Second Report/Further Notice"); Second Further Notice of Proposed Rule Making in MM Docket No. 87-268, 7 FCC Rcd 5376 (1992)("Second Further Notice"); Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making in MM Docket No. 87-268, 7 FCC Rcd 6924 (1992)("Third Report/Further Notice").

[30]47 U.S.C. Sec. 159, 47 CFR 1.1 et seq.

[31]In 1994, the networks' (excluding affiliates and independents) combined profits were $2.82 billion on revenues of $21.42 billion. Testimony of Karen Kerrigan, President, Small Business Survival Committee, before the United States Senate Committee on Commerce, Science and Transportation, Hearing on Spectrum Allocation and Assignment, September 12, 1995, at 6 (a copy of this testimony is attached as Appendix B).

for the United States government,[32] and the ongoing need for the government to find revenue sources is substantial.

The Alliance acknowledges that regulation of current NTSC broadcast licenses is not the subject of this rulemaking. On the other hand, the Commission does have an opportunity in this rulemaking to signal a more fiscally prudent course.

The Commission has repeatedly justified[33] the proposed giveaway by arguing that the spectrum is simply being utilized to make a transition to digital transmission of the same service,[34] and that the broadcast industry is not receiving anything it does not already have. This is simply false. Broadcasters are receiving 6 MHz of spectrum with vastly expanded transmission capacity for a period of 15 years, clearly something they don't already have.

The Commission claims that this is not a new service,[35] yet repeatedly refers to "changed circumstances"[36] throughout the Fourth Notice. The "changed circumstances" are those technical changes which have produced a six-fold increase in data-transmission capacity. These "circumstances" will permit broadcasters to carry on a number of commercial enterprises,

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[32]Testimony of Karen Kerrigan, supra, at 7.

[33]See Note 27, supra.

[34]Fourth Notice at 9, Par. 20.

[35]See, e.g., Fourth Notice at 12, Par. 28 ("... [w]e are not creating a new service...").

[36]See Fourth Notice passim.

including but not limited to free over-the-air television, simultaneously. ATV is no more the "same service" as NTSC television broadcasting than six Boeing 747s are the "same service" as one hot-air balloon.

IV. "TRANSITION" MEANS TRANSITION; THE COMMISSION SHOULD REQUIRE ATV LICENSEES TO PROVIDE FREE OVER-THE-AIR BROADCAST SERVICES.

A. The Commission Should Only Give Free Spectrum Licenses to Broadcasters That Provide Only One Free Over-the-Air Television Programming Service.

The Commission has explicitly and repeatedly stated in previous rulemakings that the sole rationale for giving incumbent broadcasters $70 billion worth of additional MHz was to provide them the means to make a smooth transition to a superior means of transmitting traditional over-the-air free broadcast programming.[37] The Alliance supports the Commission's proposal to require that broadcasters simulcast their NTSC service on one of its ATV channels.[38] To the extent that the Commission permits incumbent broadcasters to transmit anything other than or

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[37] Fourth Notice at 11, Par. 26 ("The eligibility determination [that only incumbent broadcasters would be eligible for HDTV licenses] was premised on the expectation that HDTV would be a single channel method of delivering higher picture and sound quality.") See also Third Report/Further Notice, 7 FCC Rcd at 6953 ("[O]ur view [is] that ATV is an advance in technology, not a new video service.").

[38] Id. at 18, Par. 41.

in addition to 100 percent of their NTSC programming on their ATV frequency, the ATV signal is a different service,[39] and broadcasters should be required to compensate the government for these additional uses. The Alliance is concerned that the non-simulcast portion of a channel's broadcast day will be utilized, not for different free programming, but for A&S. Partial simulcasting requirements should therefore not be permitted.[40]

Absent a 100 percent simulcast-only requirement, the broadcasting industry may attempt to "stop the clock" somewhere in the middle of the transition process and argue that it has created "incumbency expectation" in both its free and A&S service sectors. The industry will undoubtedly produce evidence before a future Commission -- as it may present before this Commission -- that full-time ATV is not financially feasible unless the Commission adopts a waiver of simulcast requirements. This would allow the broadcast industry, which would have in the meantime evolved into a full-service wireless data transmission industry, to use its "transition" spectrum any way it sees fit, whether for free video programming or not. The grant of "temporary" free spectrum would become a Trojan horse containing a permanent "gift" from the American people to America's broadcasting

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[39]The Alliance assumes broadcasters will use non-simulcast periods for A&S. The Alliance has no objection to broadcasters re-arranging their schedules or showing different-but-comparable programming on their free ATV channel, as long as that channel remains comparable in quality, content and broadcast hours to their NTSC service, and meets the same public interest standards as NTSC stations.

[40]See Fourth Notice at 16, Par. 37.

conglomerates.

Transmission of subscription services, data encoded on the vertical blanking interval (VBI), non-captioning "Line 21" services, or any other S&A above and beyond what is currently authorized on the NTSC channel should also be prohibited on ATV during the transition period, unless the broadcaster pays the government a fee reflecting the value of the additional transmission capacity. Broadcasters, during the pendency of their double licensing, may meet their current and outstanding contractual obligations to provide A&S via either or both of their licenses, but should be prohibited from carrying any more content than they could have had they been issued an NTSC license alone. This requirement would prevent unjust enrichment of broadcasters at the expense of other wireless telecommunications service providers and the federal government.

B. Broadcasters Cannot Be Permitted to Trade Away Their Responsibility to Simulcast.

The rationale for "spectrum flexibility" is thoroughly undermined by the Commission's suggestion that licensees might be permitted to trade away their simulcast responsibility to other broadcasters,[41] freeing up licensees' entire "transition" spectrum for S&A. It bears emphasizing that a broadcaster that transfers its transition responsibility would clearly have no

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[41] Fourth Notice at 18, Par. 42.

need for 6 MHz of spectrum to effect the transition contemplated by the rulemaking. There is simply no rational justification for providing "transition" spectrum without any actual transition -- except to reward a politically powerful group for its effective exertion of power. Only a broadcaster wishing to simulcast until its own ATV facility becomes operable should be excepted from the "no-trading" rule. In any case, no broadcaster should be permitted to begin providing A&S until it has met the 100 percent simulcast requirement using its own facilities.

C. "Spectrum Flexibility" Incorrectly Implies That Broadcasters Have a Quasi-Property Right in Spectrum.

Successive orders of previous Commissions have created a public impression[42] that the Commission is believes that the broadcast industry has a quasi-property right in its licenses[43] and in the underlying spectrum. Since the 1960s, only three licensees have had their licenses revoked for programming-related deficiencies, the last in 1974[44]. Indeed, an incumbent television licensee has never been denied license renewal in a

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[42]Paul Fahri, "The Longest-Running Show on Television: Station Licenses," Washington Post, October 13, 1995, A1 ("Not only is the TV license renewal process virtually automatic, its critics say, it is also virtually meaningless.").

[43]Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503, 506 (D.C. Cir. 1982)("... [T]he FCC has in the past impermissibly raised [license] renewal expectancy to an irrebuttable presumption in favor of the incumbent.")

[44]Fahri, "The Longest-Running Show..." at A1.

comparative proceeding.[45]

The framework of the current rulemaking leaves little room for reassurance; the Commission explicitly refers to the additional 6 MHz as "their [i.e., the broadcasters'] spectrum"[46] and asks "To what extent should we allow broadcasters to use their ATV spectrum for uses other than free over the air broadcasting?"[47] A five-year NTSC television broadcast license is not a property right to 6 MHz of spectrum granted in perpetuity for any and all uses.[48] The Commission further countenances its "property paradigm" by failing to recognize its own ability to license broadcasters' use of the spectrum for specific purposes.

The Commission cites its "belief" that broadcasters will, in

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[45]Central Florida Enterprises, Inc., supra, at 510.

[46]Fourth Notice at 10, Par. 23.

[47]Id. The Alliance believes that the question should be rephrased, "To what extent, and for what purposes, if any, should the Commission issue licenses to incumbent broadcasters for services other than ATV, given that the 6 MHz of spectrum we propose to allocate for ATV is capable of accommodating additional or other uses?" This rewording reflects that the propriety interest rests with the government, not with the incumbent licensee.

[48]The Communications Act explicitly states:

> (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act...

47 U.S.C. Sec. 309(h).

fact, use the spectrum for the purpose for which it has been licensed.[49] The Alliance finds the Commission's reliance on mere speculation inexplicable. The Commission is authorized to require that a broadcaster use its license subject to certain conditions, including free over-the-air broadcast.[50] It also has the authority to suspend a license for failure to comply with those conditions.[51] The spectrum is not the broadcasters', but the Commission's to control, because the spectrum is the property of the United States government.[52] The Commission should repudiate the industry's rhetorical sleight-of-hand in suggesting that government property belongs to the licensee. A stringent simulcast requirement is necessary to demonstrate that the Commission is serious about exercising its property rights over the spectrum in the public interest.

V. THE COMMISSION SHOULD NOT COUNTENANCE CARTELIZATION OF THE ATV MARKETPLACE.

A. The Commission Has Failed to Build a Record to Support Its "Incumbency" Eligibility Requirement.

The Fourth Notice provides no rational justification for limiting entry into the ATV marketplace to incumbent

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[49]Fourth Notice at 14, Par. 31.

[50]47 U.S.C. Secs. 303(b), (1)(1).

[51]47 U.S.C. Sec. 303(m)(1)(A).

[52]See Radio Act Sec. 9, 44 Stat.1162 (1927)(repealed 1934).

broadcasters. The policy is contrary to free-market economic policy, consumers' choices and basic fairness. The Commission has made assertions about the public interest that are simply not backed up either by the record or by the Commission's own arguments.

The Commission's defense of its limitation simply does not follow from its premises. The Commission stated that "[e]xisting broadcasters possess the know-how and experience necessary to implement ATV swiftly and efficiently."[53] However, ATV is a new service in which arguably no-one possesses superior know-how. Moreover, because the Commission is considering flexibility with regard to use of the spectrum for S&A, companies already providing S&A-type services would be in an equivalent, or even superior, position to implement use of ATV spectrum (unless the Commission limits the license to an NTSC simulcast license). If S&A constitutes the majority of signal use, current providers of S&A should be the incumbents preferred by this rulemaking.

Broadcasters are not the only entities capable of acquiring sufficient "experience" to run an ATV operation, as the Commission implies. Talent can be and is bought. A Regional Bell Company -- or for that matter, an independent investor with sufficient capital -- can assemble a management and engineering team that would provide superior service to a community as easily as an incumbent broadcaster. The phenomenal growth of satellite networks on cable -- as well as the growth of the cable industry

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[53] Fourth Notice at 11, Par. 26.